ENVIRONMENTAL ASSESSMENT BOARD

Annual Report

Fiscal Year
Ending March 31st
1987

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CHAIRMAN'S MESSAGE

"An understanding of the environmental crisis illuminates the need for social changes which contain, in their broad sweep, the solution of the environmental crisis as well. - But there is a sharp contrast between the logic of ecology and the state of the real world in which environmental problems are embedded."

Barry Commoner, "The Closing Circle", Knopf., New York 1972

It is now only slightly more than a year since mankind was confronted with the stark reality of widespread environmental damage to both human life and fragile ecosystems caused by the Chernobyl nuclear accident. No other single event in recent times has so graphically illustrated the interdependence of man and nature and the delicate balance that must be preserved at all costs if we are to ensure our own survival and that of future generations.

The Chernobyl incident served to focus the attention of the world upon the devastating ecological impacts that can be created by a single human error or equipment malfunction. It also underlined the potential for a relatively localized incident to become a global threat. Clearly the need for every jurisdiction in every part of the world to safeguard the environment has never been greater, and those of us charged with this task, be they government, regulatory tribunals such as this board or, indeed, individual citizens, must realize that solutions to a myriad of environmental problems have to be found - while there is still time.

The necessity for global cooperation and responsibility was the overriding theme of the report recently published by the Brundtland World Commission on Environment and Development. For the first time an attempt was made to propose long-term environmental strategies that would enable the international community to deal with environmental concerns more successfully. However, the effect of the Commission's recommendations will only emerge through the response of individual nations, states and ordinary citizens. Collectively, their reactions will profoundly influence our chances for attaining a healthy and sustainable environment.

In Ontario, several programmes have been introduced to combat pollution.

The province recently embarked upon its Municipal Industrial Strategy for Abatement (M.I.S.A.) which is designed to stop the flow of waste into our waterways. Like the "Countdown Acid Rain" programme introduced in December 1985 to deal with air pollution, M.I.S.A. requires industry and municipalities to make steady reductions in waste emissions.

The provincial government has also undertaken a series of initiatives which reflect a growing conviction that pollution offences must be taken more seriously. A major effort is being made to tackle corporate industrial pollution. Increased fines, the possibility of imprisonment and the imposition of liability upon directors and officers of corporations are now potent new weapons in the hands of environmental enforcement officers as the result of the enactment of the Environmental Enforcement Law Amendment Act proclaimed in December 1986.

A major review of the Environmental Assessment Act, the Environmental Protection Act and the Ontario Water Resources Act is being conducted by the Ministry of the Environment. Ultimately, this may result in amendments to the legislation and/or changes in the jurisdiction of the Environmental Assessment Board.

Developments Within the Board

During the last year, the Board has undergone a period of substantial change and reorganization.

There has been a redefiniton of the responsibilities exercised by administrative personnel. The position of Board Secretary and that of Hearings Registrar under the Consolidated Hearings Act have been combined. This will permit more centralized control over vital hearing-related functions such as providing assistance to members of the public and counsel involved in hearings and the issuance of notices of hearing. The Board Secretary/Hearings Registrar is aided by an assistant Board Secretary/Deputy Hearings Registrar. Yvonne Lane and Nada Davidovic recently joined the Board to assume the positions of Board Secretary and Assistant Board Secretary respectively, bringing with them many years of experience in both government and the private sector.

In April 1987 two part-time members, Jim Britnell and Wilfred Roy, retired from the Board. They were replaced by Anne Koven and Alan Roy, who were appointed to three-year terms. Dr. Douglas J. Kingham also joined the Board as a full time Vice-Chairman, bringing the membership of the Board to eleven, of which five, including the Chairman, are full-time and the remaining six part-time. The part-time members are drawn from different regions of Ontario, so that the Board contains representatives from all parts of the province.

In addition to completing its administrative reorganization, the Board is conducting a comprehensive review of its existing office systems, procedures and equipment requirements with a view toward streamlining and improving the efficiency of all facets of its operations. This will enable the Board to meet an expected increase in its case load. The introduction of an information retrieval system to assist both Board members and the public in preparing for the hearing remains a high priority and should be implemented during the current fiscal year. As well, the Board is in the process of establishing a much-needed working library which will provide members with in-house research facilities.

In early April 1987, the Board released draft rules of procedure and invited comment on them from the public and other interested parties in advance of a public "Rules Hearing" held in June. The response was both enthusiastic and indicative of the interest of those involved in the Board's proceedings, and all submissions will be considered carefully when the Board finalizes its Rules of Practice later this year.

The relocation of the Board's offices mentioned in the last annual report will in fact take place early this fall and will provide the Board with the appropriate facilities with which to carry out its mandate.

The past year has been an important one for the Board in terms of the applications dealt with, and some bear mention here.

The Ontario Hydro bulk transmission facility hearing before a Joint Board, which commenced in November 1985, concluded in November 1986, and a decision was handed down shortly thereafter.

In addition, an application by the Ministry of Transportation and Communications under the Environmental Assessment Act with respect to Highway 416 was disposed of, as were a number of applications involving landfill site expansions, water works and sewage treatment facilities.

Since the date of the last report, Board members have held two funding hearings with respect to the eligibility and allocation of intervenor funding provided by the government pursuant to specific Orders in Council.

WHAT LIES AHEAD?

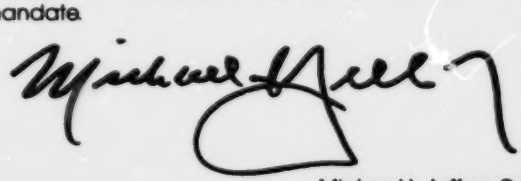
The next year promises to be a busy and productive one for the Board. A number of other important matters are expected to come before this Board or a Joint Board within the next few months. The first of the applications for municipal waste management plans are reaching the final pre-hearing stages as are two applications proposing energy from waste facilities.

Several major initiatives, such as the relocation of the Board's offices and the development of Rules of Practice, will be completed. The second in a series of joint workshops for members of this Board and the Ontario Municipal Board will be held later this year and it is hoped that work will commence on the development of Rules of Practice for the Joint Board in the next few months.

Although a great deal of emphasis has been placed on developing procedures to handle the complexities of the statutory process, the Board remains very cognizant of its role in providing a public forum, balancing Ontario's developmental and environmental needs.

To make the process more accessible to members of the public, the Board has plans for a comprehensive "citizens' guide" to its proceedings. This will provide an overview of the Board's jurisdiction and practice in a less technical form than that found in the formal rules.

In preparing to meet the challenges that lie ahead, we at the Board are confident that the administrative reorganization and improvements that are underway will enable us to discharge our legislative responsibilities more efficiently, with the concern for the environment and the public interest that is central to our mandate.



Michael I. Jeffery Q.C.
Chairman

MEMBERS OF THE ENVIRONMENTAL ASSESSMENT BOARD

MICHAEL I. JEFFERY, Q.C.
is a recognized authority in the administrative law field and holds a LL.M degree in environmental law from Osgoode Hall. He is currently a Co-Chairman of the Environmental Law Committee of The International Bar Association, Chairman of the Council of Canadian Administrative Tribunals, Canadian Editor of the Environmental and Planning Law Journal and Editor in Chief of the Canadian Journal of Administrative Law and Practice.

JOAN E. SIMPSON
is a part-time member from Brockville. Mrs. Simpson owns a company which provides managerial and bookkeeping services to businesses. She has worked in the preventive health care field for a number of years and is active in community affairs. She was appointed to the Board on October 26, 1984.

DR. O.P. DWIVEDI
is a part-time member from Guelph. A Professor of Political Science, Dr. Dwivedi has acted as a consultant to the Ministry of State for Urban Affairs, Environment Canada and the Law Reform Commission of Canada. His international assignments and consultancy include work for UNO, WHO, and UNESCO. In 1986 he was elected President of the Canadian Political Science Association.

ANNE KOVEN
is a part-time member from Toronto. Appointed to the Board in April 1987, Ms. Koven holds a Masters degree in Public Administration from Queen's University. She was Research Director of the Upper Ottawa Landfill Site study commissioned by the Ontario Ministry of Health, from 1981 to 1986. She has worked in the mining industry and with the Ontario Advisory Council on Occupational Health and Safety.

ALAN W. ROY
is a part-time member from Brighton. A science graduate from Sir George Williams University, Montreal and Queen's University, Kingston, Mr. Roy has long scientific experience in the area of fisheries protection and is currently environmental director for the Union of Ontario Indians. He was appointed to the Board in April 1987.

GRACE PATTERSON
is a full-time Vice-Chairman of the Board. She practised environmental law with the Canadian Environmental Law Association. She was a director of several environmental organizations, and served on the Science Advisory Board of the International Joint Commission. Ms. Patterson lectures on environmental law at Queen's University Law School and is a member of the Canadian Environmental Assessment Research Council.

ROBERT B. EISEN, Q.C. is a full-time Vice-Chairman of the Board. He graduated from the University of Toronto in 1951 with an Honours B.A. in Political Science and Economics, and from Osgoode Hall Law School in 1955. He served as part-time instructor in the Bar Admission Course at Osgoode Hall and practised commercial law from the time of his call to the Bar until his appointment to the Board in March 1981.

RICHARD A. PHARAND, Q.C. is a part-time member from Sudbury. A native bilingual Sudburian, he is the senior partner of the law firm of Pharand, Kuyek. He was a founding member of L'Association des Juristes d'Expression Française de l'Ontario Mr. Pharand is a member of the Advocate's Society, the Criminal Lawyer's Association, The Canadian Bar Association, and The Sudbury Law Association.

SUSAN G. TANNER is a part-time member from Ottawa. Ms. Tanner has served as Chairman of the Board of the Women's Legal Education and Action Fund, acted as a member of the Canadian Bar Association National Committee on Public Legal Education and Information and as a member of the Board of the Canadian Environmental Law Research Foundation. She has also acted as a consultant to the Law Reform Commission of Canada.

DR. JIM KINGHAM is a full-time Vice-Chairman of the Board. He has an extensive scientific background in both physics and chemistry and has been involved in environmental management since 1968. Dr. Kingham was the Director General of the Ontario Region of Environment Canada where he negotiated reductions of chemicals in the Niagara River, and was Canadian Chairman of the International Joint Commission's Water Quality Board.

MARY G. MUNRO is a full-time Vice-Chairman of the Board and member from Burlington. She is a Registered Nurse by profession and has been active in community and environmental affairs for many years, having served on various boards and commissions. Mrs. Munro has been City Alderman, Regional Councillor and Mayor of the City of Burlington. She was appointed to the Board on September 1, 1981.

JURISDICTION

THE ENVIRONMENTAL ASSESSMENT ACT

The purpose of the Environmental Assessment Act (EAA) is to provide for the "protection, conservation and wise management" of Ontario's environment. It's definition of the "environment" includes not only the natural environment but also "social, economic and cultural conditions" and "any building, structure, machine or other (man-made) device."

From this broad mandate, upon referral of an application from the Minister, the Board derives its power to approve or reject proposed undertakings. Provincial and municipal undertakings are subject to the Act, but the private sector has yet to be included, except by special designation from the Minister.

The feature that sets the EAA apart from other statutes under which the Board makes decisions or recommendations is its requirement that the proponent submit an environmental assessment in accordance with the statutory requirements. This should describe the particular undertaking's predicted impacts and any proposed mitigative measures, and also alternatives to the undertaking and alternative methods of carrying out the undertaking (along with their predicted impacts). The Board can request an amendment to this assessment before approving it.

A hearing may not be held if there is no request for one after the assessment is completed or if the Minister, using his discretion under the Act, considers that a hearing is unnecessary or may cause undue delay. With the approval of the Cabinet, the Minister can also give an exemption that dispenses with both the assessment and the hearing. Such an exemption would be given when, in the opinion of the Minister, the normal application of the Act would conflict with the public interest.

In addition to individual proposals, the EAA deals with class environmental assessments. Many smaller projects that have minor impacts would, if processed singly, create an overwhelming administrative burden; so they are assessed as a group. If necessary, specific projects under the class assessment can always be "bumped-up" and examined independently.

Provincial and municipal roads projects were the first group of proposals for which class environmental assessments were completed. The Ministry of Natural Resources has also produced a number of class EAs, including solid waste disposal, dams and dykes, and canoe routes. Major class EAs which are expected to reach the hearing stage soon are MNR's class EA for timber management on crown lands, and a municipal transit class EA.

THE ENVIRONMENTAL PROTECTION ACT

The EAB's role under the Environmental Protection Act (EPA) is more limited than under the Environmental Assessment Act. The objective of the EPA is stated as "the protection and conservation of the natural environment". The Board's jurisdiction arises from Part V of the Act which relates to waste management systems and waste disposal sites.

Regulation 309 under the Act deals with waste management. It defines various materials as waste and prescribes standards for the location and operation of waste disposal sites and waste management systems. Both "hazardous waste" and "industrial waste" have received new and more extensive definitions since Regulation 309 was amended in September, 1985.

While the Director of Aporovals has the responsibility for decisions regarding the approval of waste management systems and disposal sites, the Board may be directed to hold a hearing and make recommendations to the Director when an application for a Certificate of Approval is received. If the proposal entails the disposal of hauled liquid industrial waste or hazardous waste, or deals with amounts of waste equivalent to the domestic output of not less than 1500 persons, a public hearing is mandatory. However, the Director may dispense with the hearing in an emergency.

The Board has broad powers to recommend to the Director terms and conditions of approval. In addition to engineering requirements, these could include financial guarantees, monitoring, public information provisions, and a host of others relating to the protection of the natural environment.

The Board may recommend that the Director refuse to grant an approval if a proposed activity does not comply with the Act or its regulations; if it may create a nuisance; if it is contrary to the public interest; or if it may result in a hazard to any person's health or safety.

The Board's jurisdiction under the EPA (as well as under the Ontario Water Resources Act) is limited because the legislation does not allow the Board to make decisions. Instead it must prepare a report containing a summary of the information and views presented at each hearing, as well as its advice and the reasons for that advice. Peculiar to this legislation and the Ontario Water Resources Act is the requirement for the entire Board to review the draft report of the panel members who conducted the hearing. After consideration of the draft, the Board as a whole submits its report to the Director.

THE ONTARIO WATER RESOURCES ACT

In situations where a municipality wants to build or extend a sewage works into another municipality or a territory without municipal organization, a public hearing must be held before a Certificate of Approval is issued or a refusal given. If a municipality proposes a sewage treatment plant within its own area, the Director of Approvals also has the discretion to require a public hearing before the Environmental Assessment Board.

The Board's remaining mandate under the Ontario Water Resources Act (OWRA) is to conduct hearings on applications for the definition and designation of areas of public water service or public sewage service.

The OWRA and the EPA are similar in that the Board's role under each is merely recommendatory. Its function is to give advice and recommendations which are to be considered by the Director when he makes his decision.

THE PUBLIC INQUIRIES ACT

Occasionally, the Board is required by Order-in-Council to hold hearings under the Public Inquiries Act. The most recent example was the hearing and report on the Ministry of the Environment's proposed regulatory control of mobile PCB destruction facilities.

The Cabinet has the authority to appoint commissioners to hold a public inquiry concerning any matter affecting the good government of Ontario, the conduct of any part of the public business, the administration of justice, or a matter that Cabinet declares to be one of public concern. The Act does not apply when the subject matter is otherwise regulated by special law.

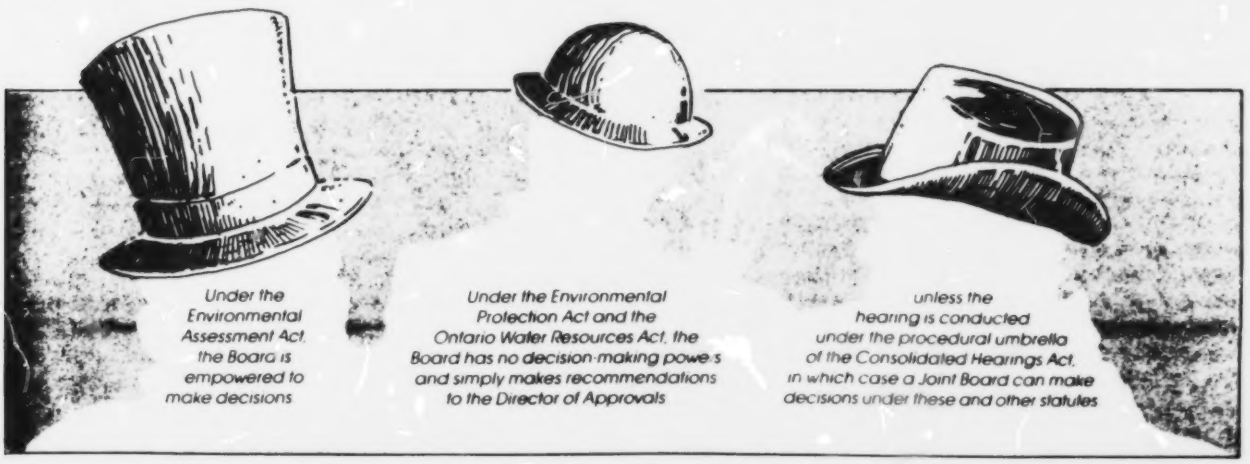
THE CONSOLIDATED HEARINGS ACT

The Consolidated Hearings Act (CHA) provides a procedural umbrella for all the specific Acts set out in a schedule to the Act. In doing this, it may give the tribunal more power than the EAB would have if sitting alone.

For example, under the Environmental Protection Act, the EAB is restricted to making recommendations to the Director of Approvals, but when a Joint Board conducts a hearing on the same matter, a decision is made. This example also illustrates that the appeal provisions of the CHA override those contained in the legislation covered by the CHA. A Joint Board decision becomes final on the 28th day after it is issued, unless there is an appeal to Cabinet, whereas a decision of the Director of Approvals under the EPA can be appealed to the Environmental Appeal Board.

An important feature of the CHA, which is not found in the EAB's legislation, is the cost-granting power that it contains. Joint Boards have awarded costs to intervenors most recently in the decision regarding Ontario Hydro's Proposed Transmission Plan for South-western Ontario.

CHA hearings generally cover applications under the EAA or the EPA, and a variety of land use planning matters. They might involve applications under the Niagara Escarpment Planning and Development Act or the Parkway Belt Planning and Development Act, as well as Expropriations Act matters, and official plan amendments, zoning by-law amendments and capital expenditures under the Planning Act.


Under the Environmental Assessment Act, the Board is empowered to make decisions
Under the Environmental Protection Act and the Ontario Water Resources Act, the Board has no decision-making powers and simply makes recommendations to the Director of Approvals
unless the hearing is conducted under the procedural umbrella of the Consolidated Hearings Act, in which case a Joint Board can make decisions under these and other statutes

THE HEARING

NOTICE

The proper dissemination of notice is a vital element in providing for a fair hearing. Notices are formulated to satisfy both legislative requirements and the principles of natural justice.

The Board's major concern is to ensure that the notice for a hearing is distributed in such a way as to reach everyone who may be affected by the matter being assessed. Well before the date of a hearing the notice will be published in local and regional newspapers and, in addition, it will be mailed to those people, bodies and municipalities who would be directly affected by the undertaking.

PUBLIC INFORMATION

In appropriate situations information centres may be established prior to the hearing, either by the Board or by the proponent under the Board's direction. The purpose of an information centre is to provide a convenient location where interested persons can obtain information on the general nature of the hearing and the procedures to be followed.

PRE-HEARING MEETING

A pre-hearing meeting may be arranged by the Board in order to have all the interested persons meet to discuss their various concerns. The meeting can cover areas of mutual agreement, particular issues which are in dispute and, generally, any matter which may be helpful in speeding up the hearing process. The pre-hearing meeting is not a formal meeting, although it is convened by way of full notice and a transcript is taken. However, no decisions relating to the proceedings are made.

PRELIMINARY HEARING

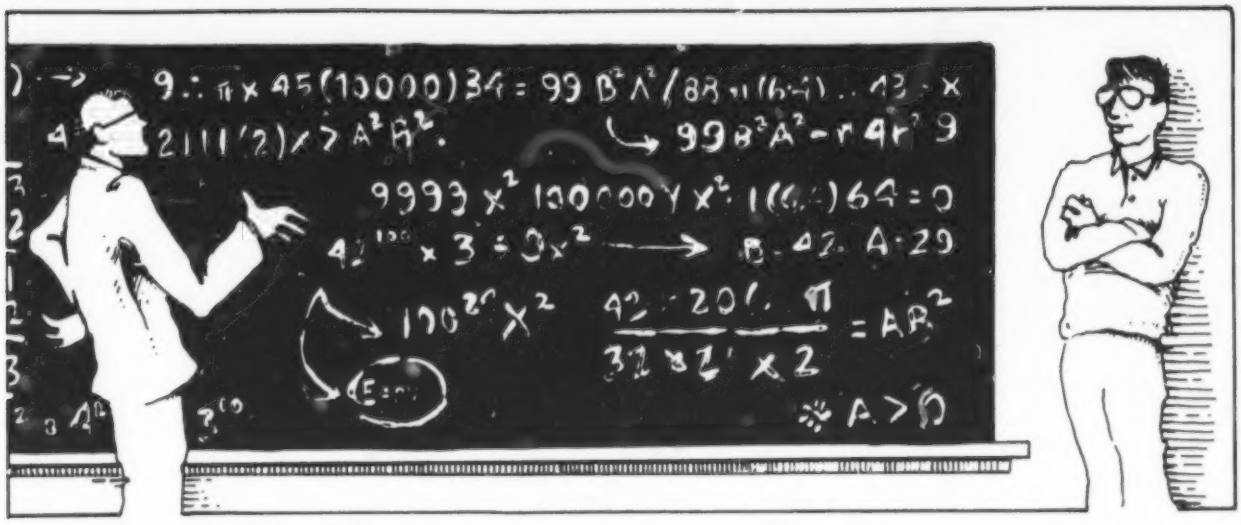
The Board may hold a preliminary hearing which is convened by way of full notice. The difference between a preliminary hearing and a pre-hearing meeting is that decisions of an interlocutory nature may be made at the preliminary hearing. These are decisions designed to deal with the situation "for the time being" while the matter is being properly resolved.

At the preliminary hearing and at the pre-hearing meeting the following matters may be dealt with:

- identifying the parties and participants;
- defining the issues in dispute;
- arranging for the exchange among parties of all documents relevant to the issues;
- considering the advantages of filing witness statements and interrogatories and establishing a procedure for this;
- identifying the witnesses to be called and generally the nature of their evidence;
- estimating the length of the hearing and possibly setting a date for the commencement.

WITNESS STATEMENTS

The Board may require the preparation and exchange of witness statements, especially when evidence of a technical nature is involved. In this way each party has the opportunity to be fully informed in advance about the issues that will be raised at the hearing. This can prevent distractions and delays during the hearing and helps to focus the attention of the parties on the matters in dispute.



INTERROGATORIES

Interrogatories are requests for information or questions put by one party to another. They are particularly useful in putting background or non-controversial information on the record quickly. Because they are often exchanged before the hearing they are also helpful in situations where, to answer a question, a witness needs to do some research or make a calculation. A considerable amount of time can be lost during a hearing if a witness is confronted with a question that requires him to perform a complex calculation or track down an obscure document for information.

Interrogatories offer two main advantages :

- they enable parties to obtain information that will help them in preparing their cases, and
- they speed up the introduction of evidence as part of the hearing record.

EXPERT ASSISTANCE

Under a provision of the Environmental Assessment Act the Board has the authority to hire experts to assist it. In recent hearings, experts in such fields as hydrogeology, toxicology and insurance have been engaged and the Board has also hired legal counsel under this provision of the Act.

The policy of the Board has been to engage expert assistance on its own initiative, or at the request of a party to the proceedings, if the Board is satisfied that the expert advice will enhance its understanding of the issues being presented at the hearing.

COSTS

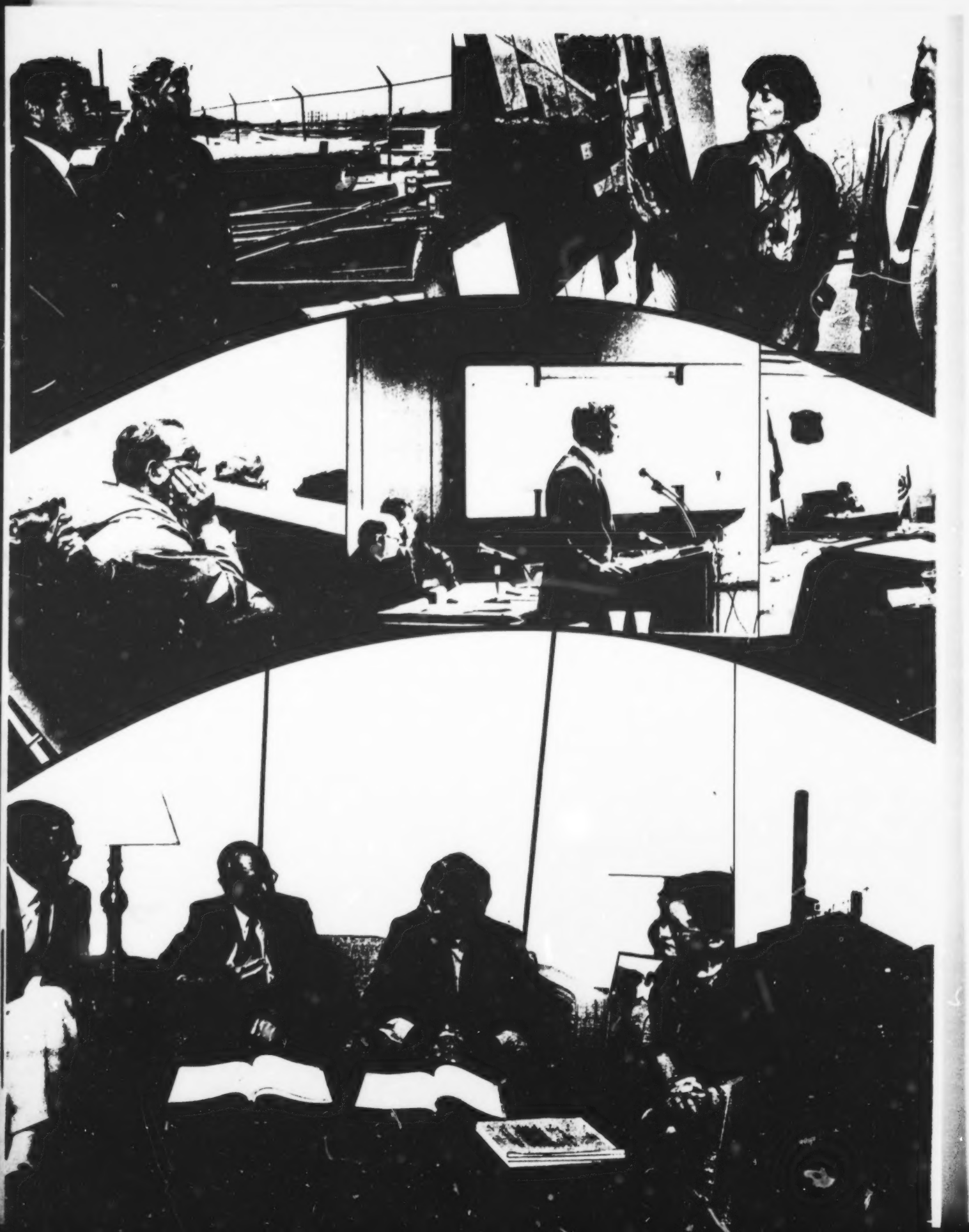
The Board considers the cost award power important in terms of both the conduct of its hearings and the redress of an imbalance between the parties. However, the Board still does not have the power to award costs under the EAA, EPA or OWRA.

APPEAL AND REVIEW OF BOARD DECISIONS

The Environmental Assessment Act and the Consolidated Hearings Act provide similar but not identical methods for review of EAB and Joint Board decisons.

Under the EAA, the Minister, on his own initiative (but with the agreement of the Cabinet), may change the whole or any part of the Board's decision or substitute one of his own. He can also require a new hearing. The CHA permits an application to be made directly to Cabinet "by any person entitled to be heard at or to take part in proceedings before the Joint Board." Any of these actions must normally be taken within 28 days of the Board's decision.

The Board's recommendations cannot be appealed under the EPA and the OWRA because the Director of Approvals is the decision-maker under these statutes. However, the proponent of an undertaking can appeal the Director's decision to the Environmental Appeal Board.



RULES OF PRACTICE

In the Board's 1986 Annual Report it was promised that a set of rules of procedure for the Board would be drafted and distributed for public comment. This would be followed by a hearing at which both the draft and submissions made in response to it could be discussed. The Board did proceed with this plan. In early April, 1987, it sent to interested parties copies of the draft rules and notice for the hearing. Newspaper notice of the Board's process, including details about the public hearing, was also given.

Before the hearing, the Board further notified interested persons that the topics of "costs", "intervenor funding", and "joint board proceedings" would not be discussed. At present the Board does not have the jurisdiction to award costs when sitting alone, so it was felt that a discussion of cost awards practice could not properly be undertaken.

Although the Board does occasionally distribute funding to intervenors under the authority of ad hoc Orders-in-Council, the government has not yet established a funding policy. It was therefore considered inappropriate for the rules to address that topic.

Finally, the Board explained that although its members sit as a Joint Board with members of the Ontario Municipal Board under the Consolidated Hearings Act, the procedures employed at such hearings are a mixture of those used by both Boards. A uniform set of rules for Joint Board hearings must therefore await consideration by both Boards.

The Rules Hearing

The Rules hearing was held on June 16 & 17, 1987. In the preceding weeks, written submissions from approximately 26 persons and organizations were received.

The Board decided prior to the hearing that in order for discussion to be organized and of most assistance to the Board, the Rules would be reviewed in sections so that all comments with respect to one matter could be viewed in the light of other opinions presented. The Board feels that this was an effective format, which not only provided for a better discussion but also expedited the hearing.

The Board was impressed with the number and quality of briefs submitted, and with the reasoned and helpful presentation of views during the hearing itself. A wide range of interests was represented both in written form and at the hearing. The function of the Rules, which is to allow persons participating in hearings to know generally how the Board operates, was recognized by the participants. A few suggested that a preamble containing a philosophical statement about the role of the Board and an outline of the Board's objectives for its hearing process could be included.

A major point of discussion was whether the Board should maintain sufficient flexibility to ignore its own rules in appropriate circumstances. The argument for this practice is that the Board's procedures could then evolve and improve over time, while the argument against it is that if the rules are not to be binding, the purpose of providing guidance will not be met effectively.

There was discussion of the Board's intention to hold pre-hearing meetings and preliminary hearings. The role and function of preliminary proceedings was questioned, and clarification suggested.

The major subjects to be contained in the rules include :

- how and when notice of hearings and procedural motions is to be given;
- determination of parties;
- electronic media coverage and how it will be handled;
- witness statements and interrogatories (written questions) prior to oral evidence;
- the order in which evidence is to be presented;
- whether the Board should hire expert witnesses and in what circumstances, as well as the role, if any, for Board counsel;
- access (and procedures for gaining that access) to documents, reports and studies.

The Board intends to consider in detail the written and oral submissions made to it, and to arrive at its final draft of the Rules by October, 1987. At that time the Rules will be submitted for approval to the Rules Committee, established under section 26 of the Statutory Powers Procedure Act. This is required by sub-section 18 (12) of the Environmental Assessment Act.

The final step, required under the same section, is approval by Cabinet. The Minister of the Environment, the Honourable Jim Bradley, has undertaken to present the Board's Rules to Cabinet for its approval. The Board hopes to have the process completed by early 1988.

INTERVENOR FUNDING

Under current provincial legislation the EAB does not have the jurisdiction to provide financial assistance to potential public participants in its hearings. Although the Consolidated Hearings Act (CHA) gives Joint Boards, comprised of members of the EAB and the Ontario Municipal Board, the power to award costs, the Divisional Court held, in a decision in 1985, that these costs can only be awarded at the conclusion of a hearing, and that the wording of the Act cannot be interpreted to include advance funding.

At present, advance funding for intervenors is possible only through an Order in Council. In June of 1984, for example, the Ontario Government provided a fund of $50,000 to be administered by a Commission, (comprised of EAB members), established to conduct an inquiry into the Regulatory Control of Mobile PCB Destruction Units. Since the 1985 court ruling, similar advance funding has been provided by Order in Council for 5 hearings. The amounts provided have varied in each case although the eligibility criteria established by each Order in Council have remained virtually the same with some refinements.

The thrust of the eligibility criteria has been to establish that the applicants for funds are persons or groups with a clear interest in the proceedings, that there has been an attempt to raise funds through other means and that there is a genuine need for assistance. Groups with similar interests are encouraged to join together. The applicants must demonstrate that they have mechanisms in place to ensure accountability and a financial plan to support the specific purpose for which funds are requested. If the hearing is to be before a tribunal with the power to make cost awards, the funded parties must undertake to seek costs at the conclusion of the hearing and repay the government the amounts of advance funding provided.

There have been two significant changes in the most recent Order in Council funding criteria. Payments to funded groups have been restricted to 60% of each group's approved disbursements, except for legal fees which may be 100% reimbursed. However, these legal fees must be calculated on the basis of the legal aid tariff and funded groups may only engage counsel at the rates established by the Legal Aid Plan of Ontario.

In the PCB inquiry, the funds were distributed by the Commission. Potential recipients were required to file an application in which they were asked to describe their history and interest in the proposed regulation, how they fulfilled the criteria and how they proposed to use the financial assistance requested. The Commission allotted the funds based on its analysis of the applications. At the conclusion of the hearings, funded parties were required to submit a report describing the use of the funds and their conclusions on the effectiveness of their participation.

In subsequent cases where a fund for intervenors has been provided, the EAB has established separate panels to administer and distribute funds in order to avoid the perception that the panel hearing the application for the approval of a project could influence the evidence brought before it by funding certain interest groups. Funding panels have been comprised of EAB members even when the hearing itself has been before a Joint Board or the Ontario Energy Board.

The most recent development in intervenor funding occurred in January 1987 when the Provincial Cabinet authorized the Chairman of the EAB to establish a Funding Panel to administer a funding programme for potential public participants in the hearings regarding the Ontario Waste Management Corporation (OWMC) proposal to establish waste disposal facilities in the Township of West Lincoln. This differs from earlier such programmes in that the Panel will make recommendations to the government with respect to the total amount of funding required. When the government has determined the total sum to be provided, the Funding Panel will distribute the funds to eligible public interest groups.

In the Board's view, the responsible funding of intervenors provides two major benefits. People who are likely to be affected by a decision of the Board can participate in a meaningful way in the approvals process and, equally important, such funding helps the Board to fulfill its mandate by ensuring that all of the issues have been canvassed and that the evidence of the proponent has been thoroughly tested. The Board also recognizes that intervenor funding programmes must be carefully administered. The terms must be clear and the responsibilities of the recipients well defined so that participation is effective and does not merely prolong the process.

NEED AND THE PUBLIC INTEREST

The Environmental Protection Act

In the last year the issue of "need" has brought to the fore some important questions. This issue was addressed by the Board most recently in a report dated August 14th, 1986 concerning an application by Decom Medical Waste Systems Inc. for approval to construct a pathological waste transfer station.

The question was raised in this case as to whether the Board could properly consider the issue of "need" when assessing applications under the Environmental Protection Act in connection with its duty to consider whether a proposal is or is not in the public interest pursuant to S. 38(2)(e) of the Act.

The Board found that it could not define the term "public interest" precisely, for it is a term that is used in a variety of contexts and, in all probability, cannot be defined with any degree of specificity. However, the Board concluded that it surely includes not only the interests of the public in general but also the interests, albeit sometimes conflicting, of the proponent and his customers and those persons in opposition to the proposed facility. It is the duty of the Board to balance all of these interests against the environmental risks associated with the proposed undertaking.

With this in mind the Board was prepared to look at the question of "need," for it was of the opinion that if a proposal which carries with it an element of environmental risk is not needed or required then it is likely that, for all intents and purposes, the proposed application is "not in the public interest."

The Environmental Assessment Act S.5(3)(a) and (b)

The Environmental Assessment Act, Sections 5 (3)(a) and (b), provides that the environmental assessment submitted by a proponent must include a "statement of the purpose of the undertaking" and a "statement of the rationale" for it. In its decisions, the Board has consistently interpreted these sections of the Act to require a proponent to demonstrate a need for the proposed undertaking.

The stated purpose of the Environmental Assessment Act is the betterment of the people of the whole or any part of Ontario. The Board must be convinced that there is a need to be met and that the proposed undertaking will satisfy this need with advantages that outweigh the disadvantages to the proponent and the people of the province. If there is no need, the Board has ruled that it cannot accept that the "wise management and conservation of the environment" required by the Act would be accomplished.

The Public Interest, In An Application Before The Ontario Energy Board

In early 1986 the Ontario Energy Board was required by Order in Council to examine and, after holding a public hearing, to report on whether a Liquified Natural Gas storage facility proposed for the Cobourg area was in the public interest. Pursuant to the Order in Council, the Board (which included a member of the Environmental Assessment Board) examined the need for the project, the alternatives which could satisfy that need, the economic feasibility of the proposal and its alternatives, the design and safety of the project, the site selection process and the environmental impacts of the project.

In its report to the Cabinet in December 1986, the Energy Board found that the proposed undertaking was not in the public interest and recommended, therefore, that the project should not be approved.

The Board's recommendation was based first and foremost on its finding that the proponent had not demonstrated the need for the proposed facility. It also found that an alternative plan for natural gas distribution facilities, put forward by an intervenor, was more in the interests of the province and therefore the public.

IMPROVING THE PROCESS

In December 1986, the Canadian Environmental Law Research Foundation published the results of the first major study of the Environmental Assessment Act (EAA) since the Act was proclaimed in 1976. The report, which was funded by the Ministry of the Environment, private industry and the University of Toronto, includes an analysis of the effectiveness of the Act and recommendations for the improvement of the process through administrative, regulatory and legislative reforms.

The Ministry, in response to the findings of the study and the comments and suggestions of proponents, intervenors and public interest groups, has initiated a "Programme Improvement Project" to review and streamline the administration of the Act.

The EAB, while its primary objective is at all times to provide full and fair hearings for each application before it, has also been working toward a more efficient pro-

cess. To this end the Board instituted the provisions for witnesses statements and interrogatories, and for witnesses to be heard in panels. These instruments have enhanced the presentation and the understanding of evidence given at its hearings.

The Board has also commented in its decisions on the need for reasonable expectations of the environmental assessment process. In its decision on the application by the Ministry of Transportation and Communications for approval of the realignment of a portion of Highway 69 in the Parry Sound area, the Board commented on the scope of the environmental assessment requirements. It expressed the opinion that :

"the legislation does not require an examination of every possible alternative but only those alternatives that might reasonably be put forward as both practical and feasible alternatives to that proposed by the proponent".

Ultimately, the Board is charged with the task of determining whether there has been reasonable compliance with the requirements of the Act. The Board's opinion was that it would be unreasonable to require the proponent to examine all alternatives in the same manner and to the same degree, for such a requirement would make the process unmanageable in terms of time and expense. However, the Board went on to suggest that perhaps the government process should include pre-consultation with the public to obtain a consensus as to the scope of the assessment investigations.

In the Highway 69 decision, the Board also recommended that proponents conduct public information programmes in the weeks preceding the hearings so that affected parties would be afforded an opportunity to examine and understand the proposals and the supporting technical information. Such programmes would enable the hearings to focus on concerns, objections or support for the project rather than on clarification of the documents.

PENDING APPLICATIONS

The role of the Environmental Assessment Board is constantly evolving. The legislation is being used in new ways, and in the coming year the first Class Environmental Assessments and other applications involving multiple projects will reach the hearing stage.

WASTE MANAGEMENT MASTER PLANS

The Environmental Assessment Branch of the Ministry of the Environment is processing approximately 30 Waste Management Plans. These Plans, which have been prepared by municipalities (often with financial assistance from the Ministry), deal with all of the aspects of future waste management, including land use planning implications, the various facilities to be employed such as landfilling, recycling and incineration, and updating mechanisms for the Plan itself. Approval may be sought for the entire Plan or for its individual components. The option is open to the municipal applicant – but all waste disposal facilities must be approved under the Environmental Assessment Act.

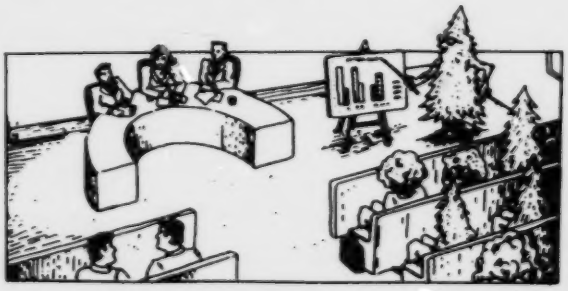
CLASS ENVIRONMENTAL ASSESSMENTS

Class Environmental Assessments provide for the approval of groups of projects in advance of any specific application. They are meant to allow for the assessment of recurring activities. Such activities have known impacts and often there has been experience with mitigation measures which can be applied generally.

Class assessments must include an outline of how the proponent will plan for specific sites and there are provisions for the "bumping up" of projects to an individual environmental assessment if there are issues that cannot be resolved.

A number of Class Environmental Assessments have been approved by the Ministry of the Environment (MOE) without hearings before the EAB. For example, the Ministry of Natural Resources (MNR) has received approval for class assessments for a number of projects including the construction of access points, docks and ponds and for fish stocking.

At present the MOE is processing an application from MNR for approval of a class environmental assessment of its Timber Management Plan. MNR has requested a hearing before the EAB on this matter.



THE SOUTHWEST ONTARIO HYDRO HEARINGS

A. EXPROPRIATION

After 131 days of evidence and argument, the Ontario Hydro hearing for approval to proceed with a transmission plan for southwest Ontario was concluded in November, 1986. The application was before a Joint Board and it was for the construction of high voltage transmission lines and supporting towers designed to utilize more fully the power generated at the Bruce Nuclear Power Development located on the shores of Lake Huron. The plans also included a transformer station and associated facilities to be constructed in the London area.

The application was submitted under the Consolidated Hearings Act and some of the scheduled acts that it encompasses – the Environmental Assessment Act, the Niagara Escarpment Act, and sections 6, 7, and 8 of the Expropriations Act. The Expropriations Act has previously been invoked by Joint Boards in, for example, the Town of Palmerston Sewage Treatment Facility and The Southeast Ontario Hydro Hearing, but there has never been a hearing (except for the first Southwest Ontario Hydro hearings that were aborted) to which the provisions of the Expropriations Act were applied either on such a large scale or with such far-reaching results.

In the proposed construction, over 800 km of routes were considered, although the modified plan that was eventually approved by the Board involved a considerably shorter route. This was because three alternative plans were put forward originally and Ontario Hydro already owned some of the lands over which the proposed lines were to run. Nevertheless the size of the approved expropriation, over 300 km in length, was considerable and remains by far the largest to date.

Even though Hydro requested and obtained expropriating rights, the Corporation has a well-defined policy of negotiating mutually satisfactory settlements with landowners. Where such settlements are reached, Hydro need not invoke its expropriating rights.

If expropriation does become necessary, the corporation has clear cut compensation policies. It presented evidence of these to the Board, which found them to be fair and equitable.

The expropriation normally sought by Ontario Hydro is right-of-way (easement) rather than outright ownership. However, its policy allows for the purchase of a strip of land for its line if the owner so desires, provided that the severance so created does not contravene local municipal by-laws.

Pursuant to the provisions of the Environmental Assessment Act, the Joint Board gave approval for Ontario Hydro to proceed with a modified version of one of the proposed plans. This will permit the construction of facilities on the lands described in a schedule attached to the decision.

The acquisition of these lands and/or the easements then had to be dealt with separately under the provisions of the Expropriations Act. The Joint Board, in its capacity of inquiry officer under this Act, found the taking of the lands described in the said schedule to be fair, sound and reasonably necessary in the achievement of Hydro's objectives. The Board, in its capacity of approving authority, approved the expropriation of the lands "with such modifications, if any, as may result from the terms and conditions set out in a further schedule" identified as Schedule "C".

Schedule "C" contained terms and conditions defining some of the steps necessary to effect a final transfer of ownership of the property. This will be accomplished when the Joint Board signs the expropriation plans.

Before these plans can be signed, the proponent is required to file an affidavit certifying that the right-of-way shown on the expropriation plans matches that set out in the original schedule. However, some modifications may be necessary later on. In the actual process of surveying and engineering testing, the proponent may find that there is a need for a realignment of the centre line of the right-of-way and a corresponding shift in location of the right-of-way itself. Anticipating this possibility, Ontario Hydro requested that the Board defer decisions regarding these changes either to itself or another Joint Board if a further hearing is required.

The provisions regarding the realignment of the centre line allow for two different situations dealing with affected lands. The term "affected lands" is defined as being not only the lands over which the amended right-of-way would be located but also those lands within 120 m of the amended right-of-way. It was the opinion of Ontario Hydro, and the Board, that owners of the latter category of lands should also be afforded the opportunity of making representation before the Board because of the proximity of the proposed route to their property.

Where the proposed realignment is consented to by all of the owners of affected lands (as defined above) the right-of-way is deemed to have been determined by the original decision of the Joint Board. However, where any owner of affected lands opposes such realignment, a hearing of the Joint Board at which the landowners may make representation would be con-

vened upon proper notice. The Joint Board would then make its decision on the final location of the right-of-way.

In the Southwest Ontario Hydro hearings the Joint Board used the provisions of the Environmental Assessment Act to attach conditions of approval that go beyond Hydro's own guidelines. For example, one of the corporation's guidelines stipulates that where lands are directly crossed or touched by a right-of-way and the residence is within 75 m of the edge of the right-of-way, the owner of the land may require Ontario Hydro to purchase his entire property. The owner also has the option of requiring Ontario Hydro to remove the residence and place it elsewhere on the same property. Usually this guideline applies to properties affected by 500 kv lines only, but in this case the Board made it a condition of approval that this "buy out" option would also apply to the 230 kv lines which will be installed in the vicinity of the new transformer station in the London area.

B. A MULTI-LOCATIONAL HEARING

The undertaking and alternatives put forward by Ontario Hydro involved the construction of a transmission station in the London area and transmission lines in three corridors: from the Bruce Nuclear Power Development on Lake Huron to Essa (near Barrie), from Bruce to the new transmission station near London, and from the transmission station to Nanticoke.

Hydro proposed, and the Board agreed, that it and other parties in continuous attendance should submit evidence of a general nature at one location only – in this case Guelph. "General" evidence included a description of the Bulk Electric System, a description of the Bruce Nuclear Power Development, the need and purpose of the project, load forecasting, deficiencies of the present system, methods employed in route selection, a description of the transmission facilities, alternatives to the undertaking, anticipated noise, relative performance and costs of the plans, mitigation measures, etc.

It was also proposed that Ontario Hydro and the other parties involved give evidence pertaining to the particular routes and the transmission station at appropriate locations. Markdale, Clinton, Simcoe and London were therefore designated as the centres for this latter type of evidence.

The Board considered the possibility of having Ontario Hydro repeat its evidence on general issues at each of these locations. The suggestion was rejected on the basis that the safeguarding of individual rights involved in such a cumbersome arrangement would not offset the expense, delay, and logistical problems involved in having witnesses travel from one centre to another in order for their evidence to be repeated and subjected to repetitious cross-examination. In short, the Board viewed the suggestion as neither practical nor feasible.

Instead, several safeguards were built into the hearing process that ensured the protection of basic rights and afforded the maximum opportunity for residents and others to appear before the Board at minimum expense and inconvenience to them.

— Transcripts of all the hearings were typed within 3 days of the hearing dates and were quickly distributed to some 20 repositories, i.e. Hydro area offices and public libraries, for the convenience of the public. Copies of some of the exhibits were also available for perusal at the repositories.

— The Board publicized dates and times of the locational hearings in some 80 newspapers well in advance of the hearings, including times for night sessions for those people who were unable to attend during the day. The Board allotted sufficient time in each centre to allow every person wishing to make a submission the opportunity to do so. It initially set aside three weeks for each centre and found that in three of the four locations a further session of several days or even weeks was necessary in order to complete the hearing of all evidence.

— The parties who gave general evidence in Guelph did not repeat their evidence at the other locations but any person not able to attend the Guelph phase of the hearing was invited to give any evidence relevant to the undertaking at these centres including evidence of a general nature. Thus, Ontario Hydro and the parties who were in attendance at Guelph, confined their evidence, say at Markdale, to the Bruce to Essa line and residents and other persons were able to give evidence not only with respect to that line but with regard to general issues as well. Up-to-date transcripts were available to help them in this regard.

— Written submissions of individuals who did not attend any of the hearings were admitted as evidence following perusal by any interested parties who might have wished to comment or object to the introduction of the submission.

The above procedures had the advantage of allowing better planning by all parties and individuals. They knew, well in advance, the category of evidence that would be presented at a given time and place and could schedule their activities and attendances accordingly. Given the magnitude of the undertaking and the logistics involved in holding these multi-locational hearings, the Board was of the opinion that everyone who so desired was able to participate personally and fully in the hearings.

C. EXPERT OPINION EVIDENCE

Expert opinion evidence is accepted in court hearings, but when it is presented to tribunals such as the Environmental Assessment Board, it adds a different dimension to the hearing process. Whereas in a court the main issue is the determination of liability or guilt based on past events, hearings before the Environmental Assessment Board involve applications for the approval of plans for the future. The expert at such a hearing may simply provide an assessment of the existing technical situation but, in addition, he is likely to be called upon to give his opinion on the potential efficacy of an undertaking and its ability to produce the results forecast by the proponent. The hearings before the Environmental Assessment Board are oriented towards the future, and projections and predictions are common.

In consequence, opinion evidence before an Environmental Assessment Board is of a different order and magnitude than that offered at a court trial. During a trial the judge and/or jury is able to test expert evidence to a certain extent against the end result which is before them. They are able to ascertain whether the evidence is consistent and to what degree it supports the events which brought about the trial. No such comforting tests are available to the hearing tribunal, although evidence of an existing similar project can be of help. A great deal of reliance is therefore placed on expert opinions at an Environmental Assessment Board hearing, and for this reason the evidence must be subjected to the closest scrutiny. The outcome of a hearing will often turn on such testimony.

"Expert" evidence usually concerns an area of endeavour that is beyond the experience of the ordinary individual. Most often it is of a technical or scientific nature and serves two purposes. Primarily it provides basic information for a proper understanding of the issue that is before the Board. In addition, it helps the Board to draw the necessary inferences by allowing the expert to state his opinions and conclusions.

Abundant expert evidence was introduced at the South-west Hydro Hearings. In two instances, attempts were made to carry it beyond its generally accepted bounds and it was therefore either rejected or given minimal weight by the Joint Board.

In this hearing the undertaking before the Joint Board involved the construction of high voltage transmission lines and supporting towers to carry power generated at the Bruce Nuclear Power Development on Lake Huron through extensive areas of South-west Ontario. The Joint Board heard evidence from a wide variety of experts including engineers, environmentalists, aviators, farmers, planners, agricultural experts, land appraisers, economists, conservationists and one in the area of sound. The proponent, Ontario Hydro, presented the Joint Board with three plans representing alternative line configurations. The corporation strongly favoured one of these plans and argued vigorously for its acceptance.

Counsel for the experts, at the outset, led their respective witnesses through evidence to prove their expertise. Such evidence included educational background, employment history, professional affiliations, publications and work on projects similar to the one before the Board. A procedure initiated by counsel for the proponent and followed by other parties was to lead the evidence qualifying the witness, and then request the Board to accept the witness as duly qualified in his particular field. The Board, after allowing an opportunity for parties to challenge a witness' qualifications, made its ruling. On one occasion, a witness was challenged by counsel of an opposing party and this led to a "mini-hearing" within the hearing. Opposing counsel was allowed to cross-examine the witness as to his qualifications and this was followed by re-examination by counsel for the witness. Argument was then heard based on the evidence and the Board issued a ruling on the preliminary matter of the qualifications of the witness.

During the hearing, expert opinion was presented in several innovative formats. Two merit particular attention, the first because of the inordinate amount of time devoted to it at the hearing; the second because of its uniqueness as far as a Joint Board hearing is concerned.

The first was a presentation of what the proponent called a "sensitivity analysis", and its purpose was to demonstrate the superiority of its preferred system plan over the other two.

The analysis consisted of choosing criteria that were common to all plans, for example: acid gas, financial cost, operation, environment, socio-economic considerations and complexity of construction. Each factor was given a rating from 1 to 10 to indicate its relative importance in the overall transmission scheme. Then the criteria in each plan were assigned weights. Several combinations were offered, weighing the factors equally or in varying proportions. Each criterion then had a final number depending on its rating and weighting. These figures were added up and a total was established. The exercise for the most part produced a result that favoured the proponent's preferred plan.

Ontario Hydro's "sensitivity analysis" was followed by

similar presentations from other parties who apparently felt that this was the only method of refuting the proponent's results. In some instances different criteria were used and in all of them the ratings and weightings varied considerably. Widely fluctuating results emerged which, not surprisingly, disagreed with those of the proponent. This was not new evidence, nor repetition of evidence previously heard, but represented a selective choice of factors and an attempt to assign a relative importance to them.

There were attempts by the parties to choose issues drawn from expert testimony given earlier in the hearing and then argue the weight that should be assigned to such evidence. One might contend that this exercise did not belong to the evidentiary stage of the hearing but rather to argument. At page 76 of the Reasons for Decision, the Board states :

"This exercise in numbers, while interesting, does not constitute evidence. It represents an attempt to assess or interpret evidence from the presentors' viewpoints. Both in the choice of criteria and in the assignment of ratings and weights to them, they are making an argument of what, ***in their opinion****, are the important issues and the relative weights to be accoraed to them".*

The Board also questioned the appropriateness of assigning numerical values, giving an appearance of certainty to factors which are incapable of being reduced to figures for purposes of comparison. On the same page 76, the Board states :

"They the presentors are, in essence, attempting to clothe with a degree of numerical certainty that which lends itself more readily to a general comparison eg. poor, better and best or that which requires a qualitative rather than a quantitative comparison eg....social and natural environmental factors".

The Board rejected the various sensitivity analyses as evidence.

Another presentation made by an expert dealt with the results of a public opinion poll. The expert was a well qualified specialist in the conduct and interpretation of such polls and his findings and interpretations tended to support the proponent's choice of a system plan.

The argument can be made that, even though the opinions of the expert were "expert opinions" simply because they came from a person who was eminently qualified in his field, his opinions were derived from opinions expressed by non-experts – in other words, opinions on public opinion. The Joint Board responded forthrightly. At page 78 of the Reasons for Decision, the Board stated :

The Joint Board has no dispute as to the findings of the

poll but questions the weight to be attached to those findings as opposed to facts and considerations elicited during a long (131 days) and complicated hearing. If a decision on Ontario Hydro's proposal were to be guided solely or mainly by public opinion, then the argument could be made that this hearing has been a waste of time and money and the decision should be determined by the findings of a poll similar to the one described by (the witness). The Board does not think that anyone would suggest this course of action in order to arrive at a decision. There is too much at stake to be decided by a series of questions answered by the man on the street who has not had the benefit of hearing evidence by experts and those directly affected by the undertaking. When (the witness) was asked by the Board whether the average person questioned in the poll would consider the environmental impact of transmission lines, the heights of towers, loss of farm lands, visual impacts, loss of woodlots, noise, damage to environmentally sensitive areas – his answer was a resounding no. Yet it was considerations such as these that took up a good part of the hearing time. The poll does not replace a hearing and its findings cannot supersede evidence given under oath and which was subjected to cross examination. The findings of the poll, while helpful in bringing public opinion to the attention of the Joint Board, is not evidence or the type of evidence on which a Joint Board can base a decision. The findings, at best, have a minimal corroborative value if they accord or are consistent with the evidence adduced."

In the matter of experts and their testimony, this hearing drew attention to several important aspects :

- The method of properly qualifying expert witnesses.
- The immense weight given to expert testimony at hearings of the Environmental Assessment Board and the need to carefully scrutinize and weigh such testimony.
- The difference between argument and evidence, and the problems of attempting to quantify and make certain that which is really subjective.
- The limited value of opinion polls in the hearing context.